

# **2021 APAAC Annual Prosecutor Conference**

June 23 – 25, 2021



## **Between Charging & Charged: The Humble Power of the Prosecutor**

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# Between Charging and Charged: Prosecutorial Power

In the Age of Criminal Justice Reform

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APAAC Summer Conference  
June 24, 2021

PREDATORY RABBIS:  
THE ORTHODOX SEX ABUSE SCANDAL

# HARPER'S

HARPER'S MAGAZINE/OCTOBER 2014 \$7.99

## DO WE NEED THE CONSTITUTION?

*A Forum with:*

Donna Edwards

Mary Anne Franks

David Law

Lawrence Lessig

Louis Michael Seidman

THE TROUBLE WITH TELEVISION  
BEN LERNER'S THE TOPEKA SCHOOL

## The critical movement to transform prosecution

HARPER'S  
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ARCHIVE SECTIONS AUTHORS ABOUT STORE NEWSLETTERS  
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[Letter from Washington]

### Power of Attorney

Can progressive prosecutors achieve meaningful criminal-justice reform?

By Andrew Cockburn

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In a Walmart parking lot in Portsmouth, Virginia, in 2015, a white police officer named Stephen Rankin shot and killed an unarmed, eighteen-year-old black man named William Chapman. "This is my second one," he told a bystander seconds after firing the fatal shots, seemingly in reference to an incident four years earlier, when he had shot and killed another unarmed man, an immigrant from Kazakhstan. Rankin, a Navy veteran, had been arresting Chapman for shoplifting when, he claimed, Chapman charged him in a manner so threatening that he feared for his life, leaving him no option but to shoot to kill—the standard and almost invariably successful defense for officers when called to account for shooting civilians. Rankin had faced no charges for his earlier killing, but this time, something unexpected happened: Rankin was indicted on a charge of first-degree murder by Portsmouth's newly elected chief prosecutor, thirty-one-year-old Stephanie Morales. Furthermore, she announced that she would try the case herself, the first time she had ever prosecuted a homicide. "No one could remember us having an

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It is impossible to understand the importance of this change without being aware of the enormous power wielded by prosecutors in this country. Most people who end up in jail or prison arrive courtesy of the twenty-seven thousand prosecutors in county and city district attorney offices across the country. (Prisoners in federal lockups account for only 12 percent of the national prison population.) Some offices are enormous, such as that of the



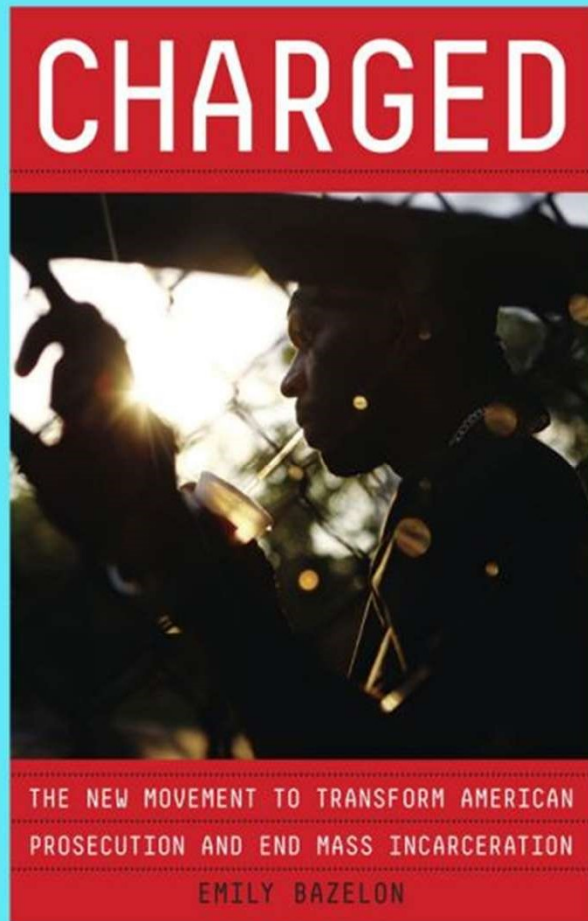
“Think of it this way,” he told me. “The most powerful single individual who can personally and directly affect the largest number of individual lives in this country is not Donald Trump. It’s Jackie Lacey, district attorney for Los Angeles County. There are fully ten million people in the area covered by her office that she can potentially choose to indict, or not indict, on major or lesser charges, send to jail or not, and all without having to refer to the city council or anyone else.” Smith singled out Lacey because her office covers a larger population than anywhere else, but D.A.s across the country exercise similarly untrammelled power. For this reason, in his 2017 book *Locked In*, Fordham law





“Somewhere along the way, the balance of power between the prosecution, the defense, and the judiciary shifted. We have to readjust it. The stakes are so high—the well-being of so many communities and the trajectories of so many lives. Public safety depends on our collective faith in fairness and our view of the law as legitimate.”

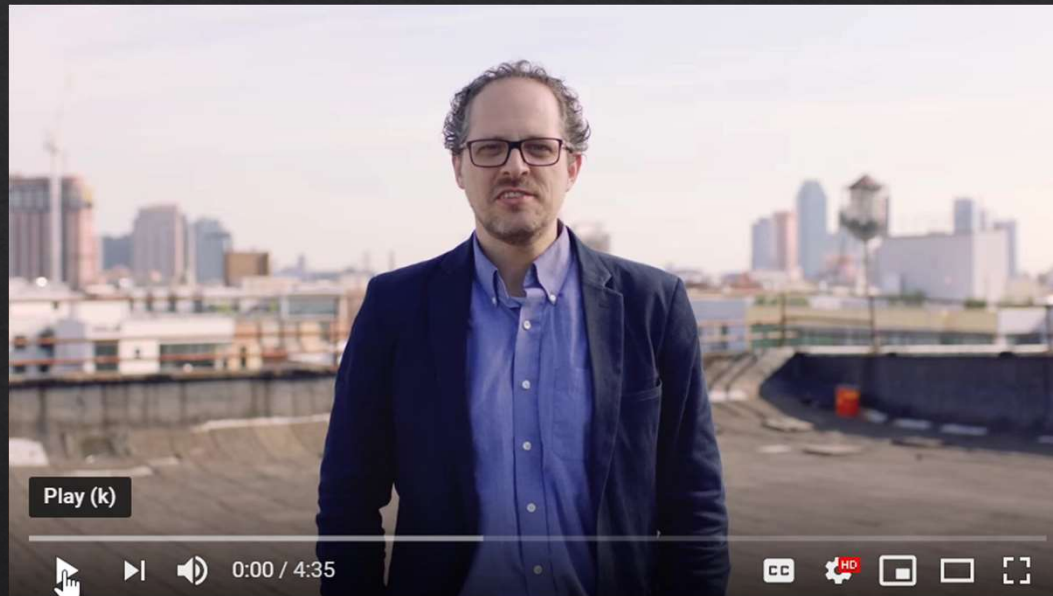
— Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*



**“The power imbalance blew my mind**, frankly: I couldn’t figure out for the life of me how prosecutors had so much power with so little accountability,”

**“The unfettered power of prosecutors** is the missing piece for explaining how the number of people incarcerated in the United States has quintupled since the 1980s,”

# The critical movement to transform prosecution





# The critical movement to transform prosecution



# The critical movement to transform prosecution



First Opened November 13, 1989. People who were born that year, on that date, are 31 years old today.

# The critical movement to transform prosecution



Reference to the amount of gross revenues Marvel made by demonstrating that Justice is coercive.



2019

## The Power of Prosecutors

Jeffrey Bellin

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## NEW YORK UNIVERSITY LAW REVIEW

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### ARTICLES

#### THE POWER OF PROSECUTORS

JEFFREY BELLIN\*

*This Article applies a critical lens to longstanding claims of prosecutorial preeminence. It reveals a curious echo chamber enabled by a puzzling lack of dissent. With few voices challenging ever-more-strident prosecutor-dominance rhetoric, academic claims became uncritical, imprecise, and ultimately incorrect.*

## Incoherence and Marginalization

- Power is fully criticized but never fully explained. It is just made out to be incoherent. And the Prosecutor is made out to be the anti-hero.
- Prosecutors begin to question their own legitimacy.
- Prosecutor silence does not help.

# Incoherence and Marginalization

**The decision to disparage the Prosecutor hinges less upon definitive matters of law than on a set of highly malleable political, moral, and visceral considerations.**

## **Goal:**

1. To neutralize the Prosecutor in the debate about law, rule and policy.
2. Proceed with “Smart Justice” on legislative and rule-making fronts.





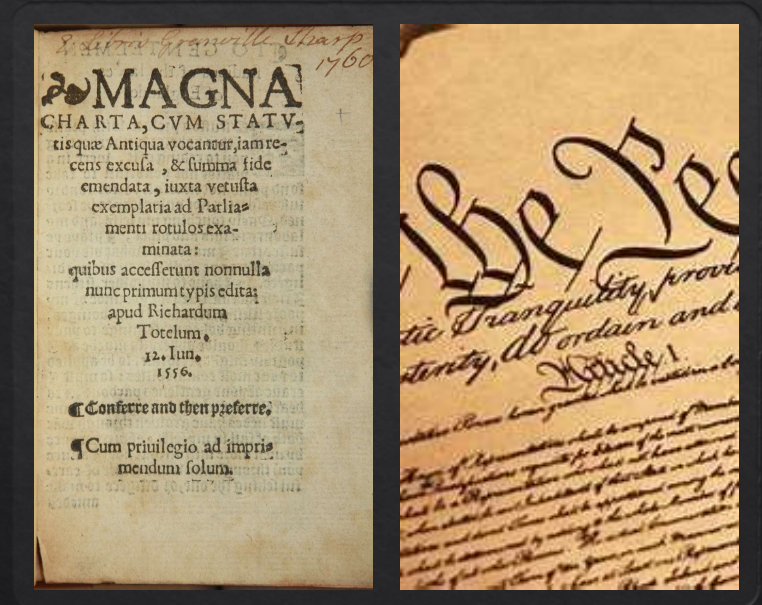
# Prosecutor

“One who carries out an action, project, or business.”

“One who carries out a cause in another’s name.”

# Prosecutors and the Law of Agency

The political state of  
anything is just an idea.





# Prosecutors and the Law of Agency

In order to govern at all the Sovereign State needs embodied individuals to actually carry out the business of being the inchoate State.





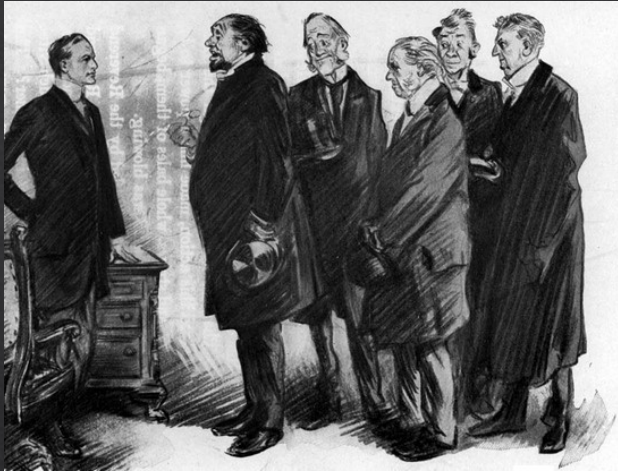


## Prosecutors and the Law of Agency

Through law the State defines the roles and methods of the Prosecutor; the qualifications and authority of the Prosecutor; how the position is carried out; or more simply:

Where the position's assignments begin and end.





# History of the American Prosecutor



**Journal of Criminal Law and Criminology**

Volume 86  
Issue 3 Spring

Article 3

Spring 1996

Recasting Prosecutorial Discretion

Robert L. Misner



# History of the American Prosecutor



## Journal of Criminal Law and Criminology

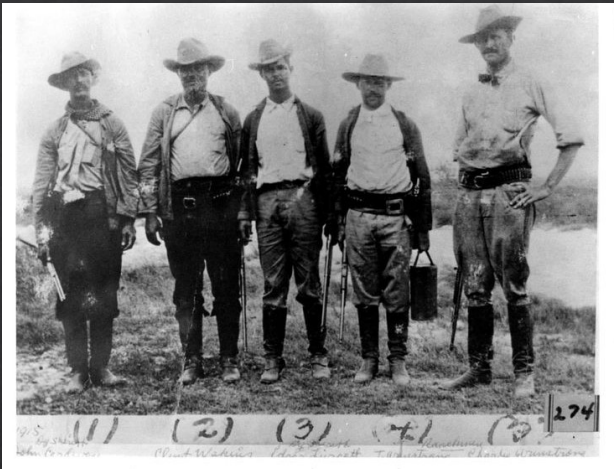
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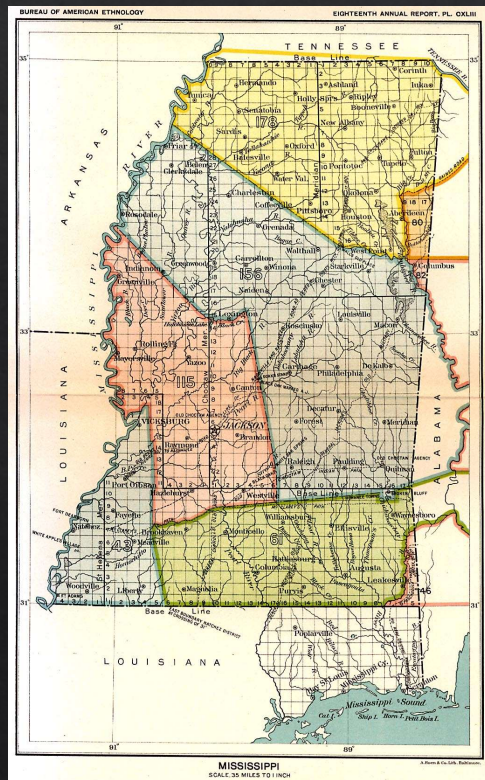
## Recasting Prosecutorial Discretion

Robert L. Misner





# History of the American Prosecutor



# History of the American Prosecutor

Recasting Prosecutorial Discretion, Robert Misner, Journal of Criminal Law and Criminology,  
86 J.Crim.L.&Criminology 717, 729-730. Spring 1996.

Common Criticism stated concisely:

*Appointed* prosecutors are beholden to the top down “at will” politics of the appointment and removal process.

*Popularly-elected* prosecutors, being relieved of patronage in a bottom-up Election, are executive officials exercising *individual discretion* to enforce laws locally.

In this way the local prosecutor expands “Power”.





What you focus on grows, what you  
think about expands, and what you  
dwell upon determines your destiny.

Robin S. Sharma

“ quote fancy



Power

“ENORMOUS Power”

UNFETTERED Power”

“A TON of Power”

“ALL The Power”

-The popular mythology of prosecutorial power.



# Power

The Power of the Prosecutor is the *authority to decide*, and having decided:

- To make that decision *effective* upon *others*.
- To *influence* the outcome of the *next decision* to be made by *others*.



# Prosecutorial Power is:



Very  
Specific.

Has little in  
common with  
malevolent  
coercive forces.

Quite Limited.



# Prosecutorial Power

- I. It is a specific expertise.
- II. Granted by authority of the State.
- III. Made applicable only through the justice system.
- IV. For the purpose of *seeking* Justice.

# I. SPECIFIC EXPERTISE

Successful Completion of an Undergraduate Degree.

Preliminary screening through standardized testing and pre-admission application, essays and interviews.

Three-years of progressively more strenuous legal training.

Successful Post-Graduate Degree in Law. The J.D.

Pre-licensing requirement of a state and multi-state admissions exam; and passage of character and fitness review.

Annual licensing requirements, continuing education, community service, and certification of continuous “good standing” by State Bar Associations.

State Bar Association supervised by the Arizona Supreme Court.



## II. LIMITED AUTHORITY OF THE STATE

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Arizona abolished the  
notion of common law  
criminal offenses.

---

State law now describes  
what constitutes a  
public offense.

Ariz.Rev.Stat. §1-211(C). Ariz.Rev.Stat. §13-101

Only the conduct or omissions proscribed by the Legislature constitute public offenses a prosecutor may pursue.

# Public Policy of the Arizona Criminal Code

- Prescribe conduct that unjustifiably and inexcusably  
Causes or threatens substantial harm  
To individuals or public interests.
- Give fair warning of proscribed conduct and  
sentences authorized upon conviction.
- Differentiate between serious and minor offenses.

# Public Policy of the Arizona Criminal Code

Insure	Insure public safety.
Impose	Impose Just punishment on those whose conduct threatens the public peace.
Promote	Promote truth and accountability in sentencing.

Ariz.Rev.Stat. §13-101 (cont.).



### III. THROUGH THE JUSTICE SYSTEM

Just how a prosecution is undertaken is primarily a matter of Rule.

The driving purpose of the criminal rules are to provide for the just and speedy determination of every criminal proceeding.

ARIZ.CONST. Art. 2, §11; Ariz.R.Crim.P., 1.1. Speedy trial requirements are primarily the responsibility of the prosecutor. See: *State v. Brannin*, 109 Ariz. 525 (1973).

# Rules of Evidence

The Arizona Rules of Evidence set guardrails upon what information the State may use to seek a prosecution or conviction.

It is only the *admissible* evidence that can constitute a fair prosecution.

“These Rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law,

*to the end of ascertaining the truth, and securing a just determination.”*

Rule 102,  
Ariz.R.Evid.



# National Prosecution Standards

A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth.

Justice is not complete without the truth always being the primary goal in all criminal proceedings.

# Rules of Procedure

Ariz.R.Crim.P., Rule 1.2 (Jan. 1, 2018).

The Arizona Rules of Criminal Procedure are construed by the Courts, parties and crime victims to:

- secure simplicity in procedure;
- fairness in administration;
- the elimination of unnecessary delay and expense; and
- to protect the fundamental rights of the individual while preserving the public welfare.

# IV. TO SEEK JUSTICE

- The First Virtue of Social Institutions.
- John Rawls, *A Theory of Justice* (1971).  
For further reference: <https://youtu.be/5-JQ17X6VNg>  
Justice Centers Upon The Notion of Basic Fairness.
- Justice Appeals To Our Inherent Bias For Safety, Security, Trust and Cooperation.

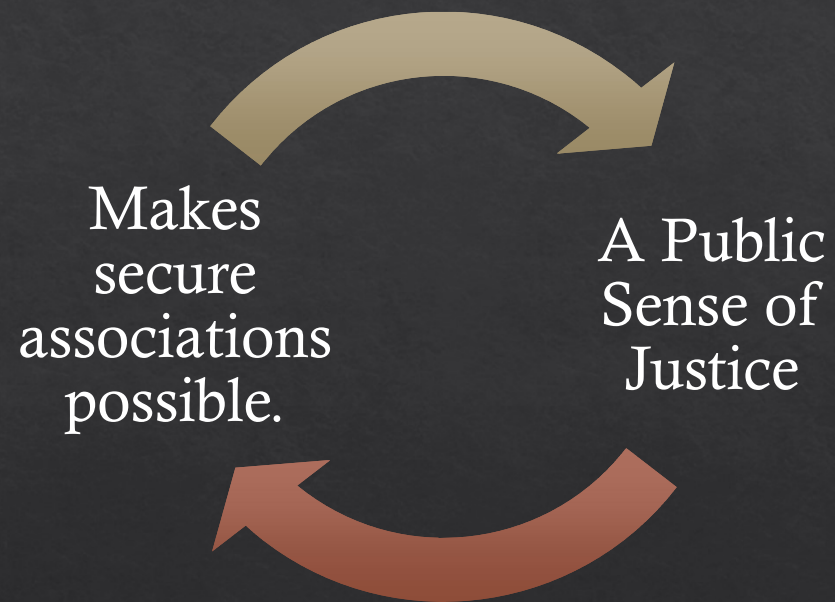


Society is well ordered when it is:

- Designed to advance the common good; and
- Effective at regulating a public sense of justice.

**A Public Sense  
of Justice**

# TO SEEK JUSTICE



# Justice and Law

We use law to declare our rational expectations for a Just future:

(a) Before the undesirable circumstances happen. And:

(b) Because the undesirable circumstances will happen.



# The Role of the Prosecutor

The Law assigns persons whose duties are to assure that



When the undesirable circumstances do occur,



Still our outcomes line up with our expectations.

That *a jury*  
of

There is a *sufficient* amount

By *proof beyond a reasonable doubt*

*Admissible* evidence

*Will* convict the defendant of the alleged  
offense

For the prosecutor to form a *reasonable belief*

## Example: Charging Review

A prosecutor should seek or file criminal charges *only if* the prosecutor *reasonably believes* that the charges are supported by probable cause, that *admissible* evidence will be *sufficient* to support conviction *beyond a reasonable doubt*, and that the decision to charge is *in the interests of justice*.

ABA Standard  
3-4.3(a)



# Preliminary Hearings

State has the burden of establishing probable cause before an impartial magistrate; and



The accused can cross-examine the State's witnesses; and



Argue against the State's conclusions.



Magistrate must dismiss without showing of substantial evidence that an offense was committed and the accused committed it.

# Indictment

Grand Jury proceeding of *sworn citizens*

Who can only indict if they are *convinced*

That it is *more probable than not* that

*an offense* was committed

And *the accused* committed it.

# The Mediating Role of Discretion



The interests of Justice support a decision to charge.



Justice Wisdom Courage Temperance

Temperance - Purposeful Restraint.

Although the State could exercise the full extent of its authority the prosecutor settles for less because it serves a greater good.

**The Mediating  
Role of  
Discretion**

# The Mediating Role of Discretion

Not to seek  
charges at all

Adjust felony  
charges to  
misdemeanor  
status

Defer prosecution  
and divert  
prosecution

Adjust charges to  
make probation  
available

Run probation in  
conjunction with  
in-patient and  
outpatient services.

Provide for  
probation with  
restitution for  
financial offenses.

# ABA Standard 3-4.4

the strength of the case;

the prosecutor's doubt  
that the accused is in fact  
guilty;

the extent or absence of  
harm caused by the  
offense;

the impact of prosecution  
or non-prosecution on  
the public welfare;

the background and  
characteristics of the  
offender, including any  
voluntary restitution or  
efforts at rehabilitation;

whether the authorized  
or likely punishment or  
collateral consequences  
are disproportionate in  
relation

to the particular offense  
or the offender;

the views and motives of  
the victim or  
complainant;

any improper conduct by  
law enforcement;

unwarranted disparate  
treatment of similarly  
situated persons;

potential collateral  
impact on third parties,  
including witnesses or  
victims;

cooperation of the  
offender in the  
apprehension or  
conviction of others;

the possible influence of  
any cultural, ethnic,  
socioeconomic or other  
improper biases;

changes in law or policy;

the fair and efficient  
distribution of limited  
prosecutorial resources;

the likelihood of  
prosecution by another  
jurisdiction; and

whether the public's  
interests in the matter  
might be appropriately  
vindicated by available  
civil, regulatory,

administrative, or private  
remedies.



## National Prosecution Standards 4-2.4 Charging Factors to Consider

- The nature of the offense, including whether the crime involves **violence** or **bodily injury**.
- The **probability of conviction**.
- The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused **criminal history**.
- The value to society of incapacitating the accused in the event of conviction.
- The potential deterrent value of prosecution to an offender and to society at large.

## National Charging Standard 4-2.4 (cont.)

The willingness of an offender to cooperate with law enforcement.

The defendant's relative level of culpability in a criminal activity.

The status of the victim, including the victim's age or special vulnerability.

Whether the accused held a position of trust at the time of the offense.

Excessive costs of prosecution vs. the seriousness of the offense.

Recommendation of law enforcement personnel.

The impact of the crime on the community.

Any other aggravating or mitigating circumstances.

National District Attorneys Association, National Prosecution Standards, Third Edition.

(Summary)

**E.R. 3.8 Special Responsibilities of the Prosecutor;**

**E.R. 3.10 Credible and Material Exculpatory Information  
about a Convicted Person.**

- Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.
- Assure that the accused of the right and procedure for obtaining counsel.
- Not seek waivers from an unrepresented accused.
- Make timely disclosure of all evidence and information, including mitigation.
- Refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.
- Continuing duty of prompt disclosure of new, credible and material, exculpatory evidence.

## Rule 42, Arizona Rules of Professional Conduct





“But I do exercise. I exercise discretion.”

# The Argument

Critics promote the notion that Prosecutors have a Power that is enormous and total and unfettered and coercive. But this is not an argument based upon law.

**It is an argument grounded in highly malleable political, moral and visceral concerns. It embodies strong, emotive language to elicit *feelings* over rationality.**

# The Refutation

Amassing coercive power is  
what malevolent super-villains  
do.

But it is not what prosecutors  
do, or even *can* do.



# The Quantum of Prosecutorial Power

Strictly limited to statutory offenses set forth by a Legislature.

Restrained by the public policy for which a Criminal Code exists at all.

Dependent upon the weight, credibility, and sufficiency of the *admissible* evidence.

Instituted by experts in criminal law; who are licensed and regulated by the Arizona Supreme Court via the State Bar Association.

Metered by the necessity for probable cause. And then,

Ethically filtered through the additional need for a reasonable belief that there is a *sufficient* amount of *admissible* evidence to support a conviction at jury trial by *proof beyond a reasonable doubt*.

A duty to affirmatively seek the reversal of unjust convictions.

The weight of our accumulated experience.

# The Counterweights to Prosecutorial Power

The burden of  
proof.

The burden of  
proceeding.

The presumption  
of innocence.

The right to  
silence.

The right to  
assistance of  
counsel.

The right to due  
process,  
including speedy  
prosecution.

The right to  
application of  
equal protection.

The right to trial  
by jury, and  
conviction by a  
jury of peers.

The right to  
appeal from  
unjust  
convictions.

The right to  
plead ineffective  
assistance of  
counsel.

The presumptive  
right to bond in  
most  
circumstances.

# The Counterweights to Prosecutorial Power

A Criminal Justice System  
designed to produce acquittals.



# Talking Prosecution without Talking Power

